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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 464

L. W. HOLT and E. A. DAWLEY, JR.,

Petitioners,

—v.—

COMMONWEALTH OF VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI TO SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinion Below

The opinion of the Supreme Court of Appeals of Virginia is reported at —— Va. ——, 136 S. E. 2d 809, and is contained in the record at R. 28-41.

Jurisdiction

The judgment of the Supreme Court of Appeals of Virginia was entered on June 15, 1964. A petition for certiorari was filed in this Court on September 8, 1964. Certiorari was granted on January 18, 1965. The jurisdiction of this Court rests on 28 U. S. C. Section 1257(3).

Statutory and Constitutional Provisions Involved

United States Constitution, Amendment Fourteen, Section 1:

> No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law.

Code of Virginia (1950), Section 18.1-292:

> The Courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following:
>
> (1) Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice;
>
> . . . . .
>
> (3) Vile, contemptuous or insulting language addressed to or published of a judge for or in respect of any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding;
>
> (4) Misbehavior of an officer of the court in his official character.

Questions Presented

1. Whether a summary conviction for contempt by a state court violates the due process clause of the Fourteenth Amendment where the conviction is based solely upon pertinent allegations made in a motion for change of venue in pending proceedings, and where the contemnors, petitioners herein, are respectively the lawyer who presented

and argued the motion and the party on whose behalf the motion was made.

2. Whether a summary contempt conviction violates the due process clause of the Fourteenth Amendment where it clearly is but one episode in a persistent history of harassment to which petitioners, both Negro lawyers, have been subjected in connection with their representation of citizens attempting to enforce constitutionally guaranteed rights in Virginia.

Statement of the Case

Petitioners are both Negro members of the Virginia Bar, and partners in the former law firm of Jordan, Dawley & Holt, Norfolk, Virginia. In October, 1961, Dawley represented the defendants in a libel suit styled *Hopewell News, Inc.* v. *Curtiss Harris et al.* which was tried in the Circuit Court of the City of Hopewell, Virginia, presided over by Judge Carlton E. Holladay (R. 4). Immediately after the suit was dismissed, Judge Holladay asked Dawley a question concerning the unavailability of certain defendants for whose appearance subpoenas had been issued. Dawley did not then answer the question. Judge Holladay issued a rule to show cause why Dawley should not be held in contempt of court for his refusal to answer the question (R. 5). Before the hearing date, Dawley filed a motion requesting Judge Holladay to disqualify himself from the contempt hearing (R. 5). When this motion was denied, Dawley filed a motion for a change of venue for the contempt hearing (R. 6).

The contempt trial came on for hearing before Judge Holladay on January 30, 1962. Holt appeared as counsel for Dawley, who was also present. Judge Holladay in-

dicated he was ready to hear the motion for change of venue. Thereupon Holt read and argued the motion (R. 11-15).

Before ruling on the motion, Judge Holladay summarily held Holt and Dawley in contempt of court, solely because of the contents of the motion and the oral argument by Holt in support thereof (R. 16). The judge certified (R. 23-24) that the following occurred:

"The Court read from the motion and pointed out, among other things therein, that both E. A. Dawley, Jr. and his counsel had said that the Court 'is now in effect and/or in fact acting as police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge.'

"The Court further pointed out that both parties had made the accusation that the Court had harassed and intimidated counsel for E. A. Dawley, Jr.; viz., Leonard W. Holt.

"The Court further pointed out the allegations in Paragraph (10) of the motion and called attention to the statement in the record that a fair and impartial trial could not be had in the Circuit Court of the City of Hopewell.

"The Court pointed out the statement made and appearing in the record that Mr. Holt's client, E. A. Dawley, Jr., could not get a fair and impartial trial applied to both trial before a jury and before the Court.

"The Court then further pointed out the nature of the limited apology.

"Whereupon and immediately before the Court fixed their punishment both defendants tendered a general apology.

> "The Court then fined both E. A. Dawley, Jr. and Leonard W. Holt $50.00 each for the contempt of which they had been summarily attached and found guilty."

The Supreme Court of Appeals of Virginia, in affirming the conviction, found that petitioners' conduct, as described in the judge's certificate, *supra,* came within the purview of Section 18.1-292 of the Code of Virginia (1950) as amended (R. 35-36).

In view of the summary nature of the contempt conviction, it was impossible for petitioners to raise any federal questions, or to interpose defenses of any kind, before being convicted. Petitioners raised the federal questions in their petition for writ of error to the Supreme Court of Appeals of Virginia, a copy of which was subsequently accepted as their brief in that court.

The opinion of the Supreme Court of Appeals of Virginia explicitly passed upon and rejected the federal constitutional claims raised by petitioners (R. 39-41).

The nature of the case at bar requires a brief mention of certain related circumstances.

The law firm of Jordan, Dawley & Holt, in which petitioners were partners, frequently represented clients attempting to enforce constitutionally guaranteed rights in Virginia and other southern states. The nature of the firm's practice was noted in *Jordan* v. *Hutcheson,* 323 F. 2d 597 (CA 4, 1963) in which the United States Court of Appeals for the Fourth Circuit considered an appeal from the dismissal of a complaint filed by the partners in the above-mentioned law firm against state officers under the Civil Rights Acts, 42 U. S. C. Secs. 1981 and 1983. The complaint alleged that the defendants were conspiring to intimidate, discourage and impede the plaintiffs and all Negro citizens

of Virginia from using the courts as a means of ending racial discrimination in that state, and that certain Virginia officials had investigated the friends and clients of plaintiffs, urged and asked their clients to abandon them, raided the offices of plaintiffs and their clients seeking to gather confidential papers and notes, and published statements naming plaintiffs as violators of the law.[1]

The incident which precipitated the *Jordan* case occurred on September 17, 1961. 323 F. 2d at 599. Just three weeks later, on October 5 and 6, 1961, petitioner Dawley appeared before Judge Holladay in the Circuit Court of the City of Hopewell as counsel for the defendants in *Hopewell News, Inc.* v. *Curtiss Harris et al.*, in which a local newspaper claimed $45,000.00 damages for libel against several leaders of the Hopewell, Virginia civil rights movement (R. 19-20). It was petitioner Dawley's conduct in the *Hopewell News* case which was at issue in the hearing on January 30, 1962 on the show cause order; it was the conduct of petitioners Dawley and Holt at the January 30, 1962 hearing which resulted in the summary contempt convictions in issue here.

Summary of Argument

I. A litigant has the right to the effective assistance of counsel. An attorney has both the right and the duty to represent his client effectively. Petitioners' convictions for contempt violate the Fourteenth Amendment because they suppressed the constitutionally protected right to counsel.

The motion to change venue could not constitutionally be the basis for contempt convictions because its language

[1] The surrounding circumstances are described more fully in Scott, Virginia Justice: If You Can't Get the Law, Get the Lawyer, The Nation, January 20, 1962, p. 51.

was relevant to the relief sought, it was presented in good faith, and it was presented respectfully.

II. Petitioners' summary contempt convictions violate the Fourteenth Amendment because (1) the constitutional requirements of a fair hearing in a contempt proceeding were not met, and (2) it was not decided by a disinterested judge.

The Constitution permits summary contempt proceedings only when the alleged misconduct was committed in open court in the judge's presence; when it was personally observed by the judge; when it disturbed the court's business; and when failure to punish would have demoralized the court's authority. None of these elements were present in the trial court below.

Due process precludes a judge from hearing a contempt proceeding for alleged misconduct before him when he has become personally embroiled. By the nature of the case at bar, the trial judge was constitutionally compelled not to sit in judgment on petitioners' alleged contempts because of his personal involvement.

III. The petitioners habitually represented civil rights clients in Virginia, clients unpopular in the dominant community. Petitioners' convictions were one more episode in a long history of harassment by state officials who opposed and hoped to inhibit petitioners' activities.

ARGUMENT

I.

Petitioners' legitimate motion for a change of venue cannot, consistent with the guarantees of the due process clause, amount to a contempt of Court on the part of either the attorney who made it or the litigant on whose behalf it was made.

A. *The conviction of petitioners denied petitioner Dawley, the litigant, the right to the effective assistance of counsel and the right to be prosecuted in an impartial forum, and denied petitioner Holt, the litigant's attorney, the correlative right to provide effective representation to his client, all in violation of the due process clause of the Fourteenth Amendment.*

The constitutionally guaranteed right to counsel means zealous and active counsel, not merely *pro forma* representation. *Powell* v. *Alabama,* 287 U. S. 45, 58 (1932). It is not only a client's right, but it is an attorney's duty to supply effective representation.[2] In *Offutt* v. *United States,* 348 U. S. 11, 13 (1954), this Court held that "counsel must be protected in the right of an accused to 'fearless, vigorous and effective' advocacy. . . ." In *In Re McConnell,* 370 U. S. 230, 236 (1962), this Court recently reiterated that it would protect "a lawyer in presenting his client's

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[2] This duty is recognized by the Canons of Ethics of the American Bar Association.

". . . [T]he lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits . . ." Canon 5.

"The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability' to the end that nothing be taken or withheld from him . . ." Canon 15.

case strenuously and persistently . . ." Moreover, "An advocate is at liberty . . . to combat and contest strongly any adverse views of the judge . . . , to object and protest against any course which the judge may take, and which the advocate thinks irregular or detrimental to the interests of his client. . . ." Oswald, *Contempt of Court* (3rd Ed. Robertson, 1911), pp. 56-57.[3]

It is virtually self-evident that any enforced modification of the duty of zealous representation will seriously limit a litigant's right to effective counsel. In constitutional effect, it would be tantamount to a denial of the full measure of that right. See *Powell* v. *Alabama, supra; Gideon* v. *Wainwright,* 372 U. S. 335 (1963).

Similarly, an attorney's recognized right to practice his profession is adversely affected. As this Court said in *NAACP* v. *Button,* 371 U. S. 415, 439 (1963), ". . . a state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." See *Schlesinger* v. *Musmanno,* 367 Pa. 476, 81 A. 2d 316 (1951).

Likewise, the right to a change of venue is a constitutional right, provided, of course, that a fair hearing cannot be had in the regular forum. *Rideau* v. *Louisiana,* 373 U. S. 723 (1963); *Irvin* v. *Dowd,* 366 U. S. 717 (1961); *Moore* v. *Dempsey,* 261 U. S. 86 (1923). The assertion of that right

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[3] Oswald reports the following exchange between Erskine and Buller, J., where Mr. Erskine insisted that the word "only" should be inserted in a certain verdict: "At length Erskine said, 'I stand here as an advocate for a brother citizen and I desire that the word "only" be recorded'; whereupon Buller, J. said, 'Sit down, Sir! Remember your duty, or I shall be obliged to proceed in another manner,'—to which Erskine retorted, 'Your Lordship may proceed in whatever manner you think fit. I know my duty as well as your Lordship knows yours. I shall not alter my conduct.' The Judge took no notice of this reply. Lord Campbell speaks of the conduct of Erskine as 'a noble stand for the independence of the Bar.'" Oswald, *Contempt of Court* (3rd Ed. Robertson, 1911), pp. 51-52.

was the heart of the motion which was the basis of the contempt convictions at bar, but the substance of the motion became so engulfed in the contempt proceedings, that one can reasonably conclude that the application itself received less than fair consideration. We would suggest, indeed, that the court's contempt ruling inevitably foreshadowed the adverse ruling on the motion itself. Certainly, if a court finds the mere filing of a motion contemptuous, it will hardly give any attention to its merits. Thus, the precipitous contempt ruling denied petitioner Dawley the fair hearing to which the motion was entitled. See *Moore* v. *Dempsey, supra.*

B. *The motion to change venue cannot be considered a contempt of court because it satisfied all the criteria of legitimacy.*

The record is clear that both petitioner Holt as counsel and petitioner Dawley as client were summarily held in contempt of court solely for filing and subsequently reading a motion for a change of venue. Of course, it is not inconceivable that the contents of a pleading might properly be found contemptuous. We need not speculate on the character of such pleadings, however, for the language contained in the venue change motion in issue does not remotely approach the outer perimeter of decorous pleading.

The trial court's certification of contempt (R. 23) contains three specifications of allegedly contemptuous allegations by petitioners: (1) that the Court "is now in effect and/or in fact acting as police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge"; (2) that the Court harassed and intimidated Mr. Holt; and (3) that a fair and impartial trial could not be had in the Circuit Court of the City of Hopewell, either before a jury or before the Court.

This Court has not had occasion to describe explicitly the perimeter of permissible language in circumstances such as these, but the implication is clear from related cases that there is nothing contemptuous in the language used in petitioners' motion.

Language similar to that used in the motion, appears in at least two reported cases of this Court reversing contempt convictions by Michigan one-man grand juries. Mr. Justice Rutledge, concurring in *In Re Oliver*, 333 U. S. 257, 278 (1948), described the Michigan system as combining "in a single official the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge and petit jury." And Mr. Justice Black, in this Court's opinion in *In Re Murchison*, 349 U. S. 133, 139 (1955), criticized "the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant." An attorney cannot be criticized, much less held in contempt, for adopting relevant language which appears in the opinions of this Court.

Examination of federal and state cases leads to the identical conclusion that the language in issue here is wholly unexceptionable. The rule which emerges from these cases[4] is that an attorney who files or presents a motion is absolutely protected from contempt as long as the motion is

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[4] These cases arose from motions to change venue as well as motions to disqualify judges, but both motions seek to serve the same end—changing the trial atmosphere for the benefit of the defendant. This can be done by either removing the trial to another court (and another judge), or by replacing the judge. It follows that the propriety of language used in either category is relevant. See Frank, Disqualification of Judges, 56 Yale L. J. 605, 619-620 (1947). Many decisions use the two interchangeably. See, e.g., *Tjosevig v. United States*, 255 Fed. 5, 6 (9th Cir. 1919) ("affidavit for change of venue or change of judge on grounds of prejudice and bias").

(1) relevant to the relief being sought; (2) presented in good faith; and (3) expressed in respectful language and manner. *Johnson* v. *State*, 87 Ark. 45, 112 S. W. 143 (1908); *Woolley* v. *Superior Court*, 19 Cal. App. 2d 611, 66 P. 2d 680 (1937); *In Re Cottingham*, 66 Colo. 335, 182 P. 2 (1919); *Zarate* v. *Culbreath*, 150 Fla. 543, 8 So. 2d 1 (1942); *Blankenbaker* v. *State*, 201 Ind. 142, 166 N. E. 265 (1929); *State* v. *Simone*, 154 La. 73, 97 So. 302 (1923); *Ex Parte Curtis*, 3 Minn. 274 (1859); *Ex Parte Howell*, 273 Mo. 96, 200 S. W. 65 (1918); *State ex rel. Moser* v. *District Court*, 116 Mont. 305, 151 P. 2d 1002 (1944); *LeHane* v. *State*, 48 Neb. 105, 66 N. W. 1017 (1896); *Ponder* v. *Davis*, 233 N. C. 699, 65 S. E. 2d 356 (1951); *Hunt* v. *State*, 27 Ohio C. C. 16, aff'd *State* v. *Hunt*, 72 Ohio St. 643, 76 N. E. 1132 (1905); *Commonwealth* v. *Sheasley*, 102 Pa. Super. 384, 157 A. 27 (1931).

> "... [I]t is the right of a party and of his counsel to apply to the judge before whom a case is pending for the purpose of having another judge try the case because of prejudice of the first judge which would prevent an impartial trial, and ... the presenting of such an application in respectful language and in a respectful manner is not of itself contempt of court." *Tjosevig* v. *United States*, 255 Fed. 5, 7 (9th Cir. 1919).

If the grounds asserted are "pertinent to the obtention of the relief ... sought ... [they] cannot be made the basis of a proceeding against him for contempt of court." *State* v. *Nunez*, 147 La. 394, 408, 85 So. 52, 57 (1920).

As long as the standards of relevancy, good faith and respectfulness are satisfied, there can be no contempt notwithstanding the fact that the statements in the motion

"may necessarily . . . reflect adversely upon the conduct and character of the judge." *Whiteside* v. *State*, 148 Conn. 77, 81, 167 A. 2d 450, 452 (1961).[5]

That these three conditions were amply met in this case is unmistakably demonstrated by the record.

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[5] The language held contemptuous in the case at bar is mild by any standard. Compared to other cases in which language was explicitly found not contemptuous, or not even suggested as being contemptuous, the language here is gentleness itself. For example, see *Woolley* v. *Superior Court, supra* (motion for disqualification alleged that judge had indicated his belief in defendant's guilt during the course of the trial and that he participated at trial in order to obtain evidence favorable to the plaintiffs); *Walker* v. *People*, 126 Colo. 135, 248 P. 2d 287 (1952) (motion for disqualification alleged that judge "has previously expressed and exhibited a determination to bring about a conviction, and if possible, the execution of the petitioner, regardless of the law or facts . . . "); *Blankenbaker* v. *State, supra* (motion for disqualification alleged that judge announced to the jury "that he knew enough of the record to send defendant to the electric chair"); *Callahan* v. *Callahan*, 30 Idaho 431, 165 P. 1122 (1917) (motion for change of venue alleged that opposing party's friendship and influence with judge made fair trial impossible); *State* v. *Simone, supra* (motion for disqualification alleged that the judge had instigated the prosecution "as a last and desperate attempt to punish the accused for not supporting him in the last preceding election"); *State ex rel. Moser* v. *District Court, supra* (litigant moved for disqualification on ground that the "Court has been charged with stealing a receipt for $3000 which I trusted them with . . . "); *Le Hane* v. *State, supra* (affidavit of prejudice alleged that judge silently concurred in his son's threat to prevent affiant from practising law because of a political dispute); *Ponder* v. *Davis, supra* (motion for disqualification alleged that judge took an active part in opposing party's political campaign and that "the great majority of the people . . . regardless of the decision of the court . . . would feel that political considerations were the determining factor"); *State* v. *Brown*, 8 Okla. Crim. 40, 126 P. 245 (1912) (prosecution charged that judge "did at various and sundry times have private and secret consultations relative to and pertaining to the merits of the case" with the defendant); *Commonwealth* v. *Sheasley, supra* (motion for disqualification charged judge with cooperating with opposing counsel to defeat petitioner's cause).

1) *Relevancy.* The purpose of the motion to change venue was to avoid trial by Judge Holladay of a contempt proceeding against petitioner Dawley because of his refusal to answer certain questions asked by the Judge, following the dismissal of a libel action against Dawley's clients (R. 5). It is surely relevant for an attorney or litigant who seeks a change of venue on the ground that the trial judge is biased to allege precisely that, and also to allege harassment and intimidation by the judge. *A fortiori*, for an attorney faced with a contempt trial before a judge alleged to be not impartial, and alleged to have harassed and intimidated him, it is certainly relevant to move for change of venue on the grounds that the Court "is now in effect and/or in fact" assuming the combined role of prosecutor and judge.[6] It is particularly relevant for an attorney, trained to function in an adversary system where there is careful separation of function, to complain of this one-man amalgamation when he himself is charged with contempt. To request a different judge, one surely does not plead an irrelevancy to claim that the present judge is "in effect and/or in fact" your prosecutor. Cf. *In Re Murchison, supra; In Re Oliver, supra.*

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[6] The objective truth of this part of the "accusation" can hardly be questioned. In an ordinary criminal proceeding there is a separation of functions between arrest, indictment, prosecution, direct testimony, rebuttal testimony, and judgment. A large number of persons are involved, each playing his own prescribed role. This is obviously not so in a contempt proceeding. Judge Holladay, and no one else, issued the rule to show cause (compulsory criminal process equivalent to summons or arrest by a police officer); there was no one other than Judge Holladay who would determine whether or not there was probable cause for the defendant to be tried (equivalent to indictment by grand jury); Judge Holladay would be in fact the principal (if not the only) witness, since the charge was contempt for refusing to answer his questions. And Judge Holladay of course would preside in judgment over all of these proceedings.

The Supreme Court of Appeals of Virginia pronounces it as "well settled" that a venue change motion "must confine itself to pertinent facts relied upon to establish that ground" (R. 37). We submit that an abundance of "pertinent facts" was set forth in the motion, including, for example: the nature of the libel suit against Dawley's clients (R. 12); the fact that there was considerable community hostility expressed towards petitioners and their clients in newspaper articles published during the course of the litigation (R. 13); that radio coverage of the proceedings was likewise hostile and prejudicial to their side of the controversy (R. 13); that the contempt proceeding, with respect to which the venue change motion was made, was initiated by and would be tried before the same judge who presided over the libel case (R. 13); that this judge had stated that he was investigating the conduct of petitioners (R. 13); that police officers had called upon petitioners' clients "at their homes and places of business on at least two occasions to harass and intimidate them" (R. 14); that the Clerk of the Court had testified for the prosecution (R. 14); that both the Clerk and the Commonwealth's attorney had participated in these events "other than in their official capacity," that they had refused to disqualify themselves, and the Judge had refused to disqualify them from participation in the contempt proceeding (R. 14); and that because of their enormous hostility to Mr. Dawley's clients and certain "boycotts, pickets and demonstrations . . . , the white people of Hopewell, Virginia, are so greatly aroused against E. A. Dawley, that it is probable that he will not obtain a fair trial in the City of Hopewell, Virginia" (R. 14-15). If the Supreme Court of Appeals of Virginia concluded that these were not

"pertinent facts", they must have been reading some other record.[7]

2) *Good faith.* The court below expressly ruled that the motion was not "addressed, in good faith, to the sound discretion of the trial court" (R. 37). Its reasons seem to have been that (a) there is no Virginia statute "which could require a judge to disqualify himself in a contempt proceeding," and (b) the motion did not "confine itself to pertinent facts." That the second stated reason is palpably erroneous is evident from the record.[8] The first assigned reason is a classical non-sequitur, for the absence of a compulsory disqualification statute has nothing to do with whether or not a venue change motion is made in good faith. The Virginia Supreme Court seems to be saying that any venue change motion is automatically suspect. But it makes no difference, insofar as good faith is concerned, whether the statute is compulsory or discretionary. Even assuming a statute which forbids such motions in their entirety, an attorney who makes it, expecting that it will be denied but seeking to preserve a record for appeal, is surely not acting in bad faith.[9] As the Supreme Court

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[7] If the Virginia Supreme Court intended to concede that there were some "pertinent facts", but that the motion was contemptuous because it did not "confine itself" to pertinent facts, it totally failed to specify what it considered not pertinent.

[8] See discussion *supra*, p. 15. Moreover, even an irrelevant statement in support of an application to disqualify a judge is not contemptuous "if it is made by the attorney in good faith to protect the interests of his client, and in the honest belief that it is relevant, and without reckless disregard of the truth or intent 'to impair the respect due to' the court." *Matter of Rotwein*, 291 N. Y. 116, 123 (1943).

[9] Cf. *In Re Henry*, 369 Mich. 347, 362, 119 N. W. 2d 671, 679 (1963): ". . . It is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable. . . . If the ruling is adverse, it is not counsel's right to resist it or to insult the judge, but only respectfully to preserve his point for appeal."

of California held in *Gallagher* v. *Municipal Court of City of Los Angeles*, 31 Cal. 2d 784, 788, 192 P. 2d 905, 908-9 (1948):

> "But certainly a mere mistaken act by counsel cannot render him in contempt of court. Even if a legal proposition is untenable, counsel may properly urge it in good faith; he may do so *even though he may not expect to be successful*, provided of course, that he does not resort to deceit or to wilfull obstruction of the orderly processes." (Emphasis added.)

A mistake in law is hardly inconsistent with good faith. To the extent that the Virginia courts seek to justify petitioners' convictions because of a claimed lack of good faith —established *ipso facto* by a claimed mistake of law—they are plainly in error.[10]

3) *Respect.* Neither the judgment of conviction, nor the "Statement of Facts and Incidents of Trial," nor the transcript of the trial itself, nor anything else in the record, contains any express rulings, findings, observations, or comments by the Judge bearing on whether or not the motion was respectfully tendered. There is present "neither proof nor finding that the statements . . . were made in a disrespectful or insolent manner or in bad faith." *Matter of Rotwein*, 291 N. Y. 116, 122, 51 N. E. 2d 669, 672 (1943).[11]

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[10] This Court has held it a violation of due process to impose a contempt conviction on an attorney without a proper hearing where the contemnor's alleged wrongdoing consisted in giving legal advice to his clients which the courts of Ohio held erroneous, but this court held "arguably" not so. *In Re Green*, 369 U. S. 689, 693 (1962).

[11] The California Supreme Court appears to have adopted a rule which goes further to protect attorneys from a situation which "invites caprice" on the part of a judge who regards himself as the injured party and metes out punishment. Even if there are express findings in the contempt order that the "'tone, the look, the manner and the emphasis' were contemptuous," the

But the Virginia Supreme Court of Appeals has in effect issued findings of fact even though the sentencing judge did not. It said, "It would be difficult to imagine a more callous attack"; "The language employed . . . was intended to be insulting"; "The motion . . . was . . . a studied attempt to smear the judge" (R. 35). Of course there is no warrant in the record for any of this.[12] They are no more than the court's own subjective evaluations of what transpired below.[13]

The most that can be said in defense of the court below is that it held that the mere making of such a motion, and its contents, *ipso facto* constituted disrespect regardless of manner of presentation and demeanor. But advocacy in-

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appellate courts will nevertheless carefully review the record and make their independent appraisal. ". . . It is not unnecessarily burdensome to require the judge first to warn the attorney that his tone and facial expressions are offensive and tend to interrupt the due course of the proceeding. Otherwise, attorneys could be subjected to fines and jail sentences because of personal annoyance and pique on the part of trial judges; and these penalties could be rendered unassailable, as is contended here, by lengthy recitals in the orders of contempt respecting the demeanor of the contemnor." *Gallagher* v. *Municipal Court of City of Los Angeles*, 31 Cal. 2d at 797, 192 P. 2d at 914.

[12] "It contains no citation of any part of the record to support it. . . ." *Parmelee Transportation Company* v. *Keeshin*, 292 F. 2d 806, 809 (7th Cir. 1961).

[13] Throughout its opinion, the Virginia Supreme Court evinces great and perhaps injudicious hostility to petitioners. In addition to the excerpts previously cited, the following may be noted: Mr. Holt's response to the contempt citation is characterized as "long and rather incoherent" (R. 32). The motion itself, the court says, "was simply used as a vehicle to heap insults upon the court" (R. 35). There is a broad suggestion that petitioners "shirked" their duty "under the guise of representing the interests of a party litigant" (R. 36). The disclaimer of intentional disrespect is described as "so-called," and "supposed" (R. 37, 38), and ridiculed as "unintelligible" (R. 38). Finally, petitioners' professional ability is questioned by a totally gratuitous observation concerning their "lack of knowledge of the established law" (R. 39).

cludes the right to point out "asserted inadequacies in the action taken by the court. . . . It does not appear here that the petitioner was overstepping the bounds of propriety by merely expressing an opinion that a prior order of the court defeated the ends of justice." *Raiden* v. *Superior Court of Los Angeles County*, 34 Cal. 2d 83, 86-87, 206 P. 2d 1081, 1083 (1949). This Court has seriously questioned whether a statement by a lawyer that he would continue to press his point and ask questions forbidden by the judge until stopped by a bailiff could in and of itself amount to contempt where in fact this eventuality did not come to pass. *In Re McConnell*, 370 U. S. 230 (1962).[14]

The Virginia Supreme Court of Appeals was also critical of petitioners' apology, holding that even if it were offered as a "disclaimer of intentional disrespect," it was not acceptable as such.[15] Regardless of questions of purging, limited apology, or general apology, Mr. Holt's statement, fairly read, is in fact a disclaimer of intentional disrespect. Mr. Holt said, *inter alia* (R. 22-23):

> ". . . We at this point would disavow any subjective intent, and to that extent would apologize to the Court.
>
> ". . . We say that our intent was not to be contemptuous; and if objectively this result is reached by looking at them [the statements in the motion] without going into our inward intent, we would say we apologize.

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[14] The precise holding in *McConnell*, that the judge could not proceed summarily under those circumstances, is discussed in Point II of this brief, *post*.

[15] R. 37-38. The only observation by the trial judge on the apology was as follows:

> "The Court further pointed out the nature of the limited apology.
>
> "Whereupon and immediately before the Court fixed their punishment, both defendants tendered a general apology" (R. 23).

"... The statements were made in the best of faith based upon a conclusion drawn from certain objective manifestations.

"... We would welcome from the court a suggestion as to how to restate the idea so as not to be contemptuous, because this [is] not our intent.

"The only thing we want in the record is that there is reason for a change of venue.

"We ... disavow any intent in certain statements to be contemptuous of the Court."

Mr. Holt quite evidently was expressing to the court his opinion that there were good and sufficient grounds for a change of venue, and that they were stated in the motion in good faith. Since the grounds included the alleged lack of impartiality of the judge, they had to be stated.

The logic of the opinion below is that the only acceptable apology would have been withdrawal of the motion. Obviously, Mr. Holt's duty to his client prohibited such surrender. See *Matter of Rotwein*, 291 N. Y. 116, 122, 51 N. E. 2d 669, 672 (1943). Instead, he stated and sought to reiterate the distinction between the bona fide attempt to plead sufficient facts for the relief sought, and any overlay these words may have had in terms of being regarded by the judge as disrespectful, insulting, or contemptuous. The distinction between his *subjective* intent not to be disrespectful, and whatever might be the *objective* effect of the words used, was therefore a most valid way of expressing this dilemma.[16]

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[16] The Supreme Court of Georgia recently held in *White* v. *State*, 218 Ga. 290, 292-293, 127 S. E. 2d 668, 670 (1962):

"Mr. White was within his rights, as a lawyer, to state his client's contention in the case. In doing so he was amenable

II.

Petitioners' summary contempt convictions deprived them of the fair hearing required by due process of law.

A. The constitutional prerequisites which this Court has held necessary to justify summary proceedings in a narrowly circumscribed area of contempts have not been met; consequently, the court had no power to proceed in a summary fashion.

The constitutional requirements of a fair hearing in a contempt case have been stated by this Court on several occasions but most explicitly in *In Re Oliver*, 333 U. S. 257, 275 (1948):

> "Except for a narrowly limited category of contempts, due process of law as explained in the *Cooke* case [*Cooke* v. *United States*, 267 U. S. 517 (1925)], requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually

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to the court for his outward manifestations, but not for his innermost thinking."

This suggests an even broader standard: One can indeed have most disrespectful thoughts about judges, but sanctions can not be imposed absent overt manifestations. But the Virginia Supreme Court of Appeals did not hesitate to probe petitioners' states of mind and concluded that there was not only an intention to be insulting, but "a studied attempt" to smear the judge (R. 35).

> observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' [*Cooke, supra,* at 536] before the public."

These "due process requirements" can be dispensed with, and a court can proceed in summary fashion, only in an aggravated situation, demonstrated by the simultaneous presence of all of the following conditions:

1) The misconduct must be committed in open court and in the presence of the judge.

2) The court must actually and personally observe the entire episode.

3) The misconduct must be of such a nature that it disturbs the court's business.

4) The misconduct must be of such a nature that failure to impose immediate punishment would cause "demoralization of the court's authority."

The first two conditions are objective, and their presence or absence in this case can be tested by the record. Therefore, except for the argument (post, p. 24) that under no circumstances did Mr. Dawley—who sat silently throughout the proceedings—commit any act at all "in open court, in the presence of the judge," petitioners' concern is primarily[17] with the two other conditions: disturbance and "demoralization". We believe that the record shows unambiguously that there was neither disturbance of the court's business, nor demoralization of its authority; consequently, there was no basis whatsoever for the application of the extraordinary summary power.

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[17] It might be noted, however, that the essence of the alleged misconduct—the contents of the venue change motion—occurred, if

The disturbance element has been defined by this Court as "obstruction to the performance of judicial duty." *In Re McConnell, supra,* at 234. In that case, an attorney who was in sharp disagreement with the court over a question of law, refused to discontinue a line of questioning in the face of an express direction by the court. He stated that he would continue to ask his questions "unless some bailiff stops us." *Id.* at 235. But he subsequently did desist before being physically restrained, though obviously aware of what might be forthcoming had he not. Yet this court observed "that there was nothing in petitioner's conduct sufficiently disruptive of the trial court's business to be an obstruction of justice," *id.* at 235-236, and a summary contempt conviction was reversed.

In case at bar there was no failure to desist after warning, no verbal clash with the judge, indeed no resistance to any judicial direction at all. Much less was there any physical obstruction. Compare *Ex parte Terry,* 128 U. S. 289 (1888). There was plainly no obstruction, disturbance or disruption of any kind.

The phrase "demoralization of the court's authority" has not been precisely defined. But this Court has held that such "demoralization" does not occur when the alleged contemnor has done no more than raise an "arguable" question of the court's jurisdiction. *In Re Green, supra,* at 692-693. In effect, petitioners here, by moving to change venue on grounds of lack of impartiality of the judge, were doing just that. As was said in *Oliver, supra,* at 278:

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at all, when the motion was filed, thirteen days prior to the oral argument in support of it. Thus, when first uttered, any misconduct here was plainly not "in open court, in the presence of the judge." It was not until the motion was read, at the judge's direction (R. 11), that anything at all occurred in open court.

"The right to be heard in open court before one is condemned is too valuable to be whittled away under the guise of 'demoralization of the court's authority.'"

B. *Since Mr. Dawley did not commit any act in open court, there was absolutely no warrant to proceed against him summarily.*

It is clear from the record that Mr. Dawley said absolutely nothing in open court. Nowhere in the transcript (R. 8-24) is there a single word spoken by Mr. Dawley, who was present in court as a party not as an attorney.

The motion to change venue was filed on January 17, 1962 and signed by Mr. Dawley, pro se (R. 6). Thirteen days later, on January 30, 1962, when the first contempt case was called for trial, Mr. Holt read the motion verbatim into the record as the major portion of his oral argument in support of the motion (R. 11-15). The following colloquy then took place:

"The Court: As I understand it, you have filed a copy of the motion you substantially made in the record in the case here. I believe you read from that?

"Mr. Holt: That is correct.

"The Court: And it is signed by Mr. Dawley?

"Mr. Holt: That is correct, sir.

* * * * *

"The Court: I notice that the pleading was filed apparently in person rather than by you as counsel.

"Mr. Holt: Well, it was signed by him . . .

"The Court: I was just merely asking—I saw it was signed by him there and not signed by you as counsel, but you appeared here today as counsel.

Is that correct? You have argued the motion. I understood that you appeared as counsel.

"Mr. Holt: I think that's what I have done, sir. It's before the Court" (R. 15-16).

The court evidently took pains to point out that the motion read by Mr. Holt was identical with the motion which had been signed by Mr. Dawley. But other than this association, tangential at best, Mr. Dawley did nothing before Judge Holladay.

As shown above, this Court has established four conditions which must be met before a court may use its extraordinary summary contempt power. The first of these conditions requires that the allegedly contumacious act occur "in open court, in the presence of the judge". That Mr. Dawley did absolutely nothing at all, much less anything contumacious "in open court, in the presence of the court" is so clear, that further argument would belabor the obvious. Accordingly, his conviction should be reversed for this additional ground. *Cooke* v. *United States, supra,* at 536.

C. *A motion for change of venue or judicial disqualification, based on allegations of the lack of the judge's impartiality, necessarily creates such a condition of intense personal involvement on the part of the judge that any contempt proceedings arising from such motion must be heard before a disinterested judge.*

This Court has held in several cases that the requirements of due process are not met by a hearing before the same judge before whom a contempt was allegedly committed, where the judge becomes personally embroiled in the events leading to the alleged contempt. See *Cooke* v. *United States, supra; Offutt* v. *United States,* 348 U. S. 11 (1954); cf. *Ungar* v. *Sarafite,* 376 U. S. 575, 585 (1964).

In *Ungar* v. *Sarafite*, this Court ruled that trial of a contempt before another judge was not constitutionally required on the facts of that case, where the record did not "leave us with an abiding impression that the trial judge permitted himself to become personally embroiled with petitioner." *Id.* at 585.[18] This case, however, is substantially different.

The measure to be applied is the depth and intensity of the judge's personal embroilment with the alleged contemnor. Admonitions and restraints directed to a witness or a party may or may not amount to an imbroglio sufficient to require trial before another judge to insure due process. But where, as here, the very matter which resulted in the contempt was a challenge to the judge's impartiality, a much stronger case is presented. It is difficult to imagine a judge being more intimately and personally involved than where the precise issue before him is his ability to be a fair judge.

In *Tumey* v. *Ohio*, 273 U. S. 510 (1927), this Court held that even a relatively modest financial interest in the outcome of a case was of sufficient constitutional magnitude to preclude judicial disinterestedness. How much more so when the judge's principal professional and public virtue—the *raison d'être* of his judicial function—is being directly challenged.

The full measure of due process in this case required a nonsummary hearing before a disinterested judge. Cf., Federal Rules of Criminal Procedure, Rule 42(b).

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[18] Furthermore, Judge Sarafite did not proceed summarily. He gave the petitioner notice, and held a hearing at the close of the trial. This Court intimated but did not flatly hold that "a nonsummary hearing was required." In any event, "the hearing afforded petitioner satisfied the requirements of due process." 376 U. S. at 589.

III.

Lawyers who habitually represent citizens attempting to enforce constitutionally guaranteed rights must not, on that account, be subjected to harassment in the form of summary contempt proceedings.

This case presents again the problem of the lawyer who represents an unpopular cause.[19] Petitioners are both Negro lawyers who habitually represent civil rights litigants. Unfortunately, it is a matter of common knowledge that many communities in Southern States, including Virginia, display a deep-rooted and persistent hostility towards the civil rights movement, and especially against lawyers who express its legitimate ambitions.[20] Civil rights lawyers and their clients find themselves attempting to enforce constitutionally guaranteed rights in a community whose most influential members are often their most bitter adversaries.

In recent years frequent attempts have been made to suppress the activities of civil rights lawyers in Southern communities. The attempts often take the form of regulatory measures which, on their face, may appear salutary and impartial, but which in fact are aimed directly against the proponents of civil rights. In a recent case arising in Vir-

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[19] See, e.g., Downs and Goldman, The Obligation of Lawyers to Represent Unpopular Defendants, 9 Howard L. J. 49 (1963); Symposium, The Right to Counsel and the "Unpopular Cause," 20 U. of Pitt. L. Rev. 725 (1959); Cheatham, A Lawyer When Needed (Columbia Univ., 1963); Rostow, The Lawyer and His Client, ABA Journal, January, 1962 and February, 1962.

[20] For expressions of hostility against petitioners herein for their general efforts on behalf of civil rights litigants, see, e.g., Report of the Committee on Offenses Against the Administration of Justice to the Governor and the General Assembly of Virginia (Senate Document No. 16, 1961), pp. 7-8; Scott, Virginia Justice: If You Can't Get the Law, Get the Lawyer, The Nation, January 20, 1962, p. 51; *Jordan* v. *Hutcheson*, 323 F. 2d 597 (CA 4, 1963).

ginia, this Court pierced the form of a state's purported attempt to regulate, found in substance an attempt to inhibit a constitutionally guaranteed activity, and granted relief to the lawyers and their clients. *N. A. A. C. P.* v. *Button*, 371 U. S. 415 (1963). See also *Gibson* v. *Florida Investigation Committee*, 372 U. S. 539 (1963); *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449 (1958); *Bates* v. *City of Little Rock*, 361 U. S. 516 (1960); *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *Jordan* v. *Hutcheson*, 323 F. 2d 597 (CA 4, 1963). This Court has demonstrated that it will reject all measures, "no matter how sophisticated", which may be employed "in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights." *Louisiana ex rel. Gremillion* v. *N. A. A. C. P.*, 366 U. S. 293, 297 (1961). See also *Dombrowski* v. *Pfister*, 227 F. Supp. 556 (DC La. 1964), probable jurisdiction noted 377 U. S. 976 (1964).

The summary contempt proceedings did not occur as an isolated event. Rather, they represent but one more episode in a long history of harassment, indulged in by many state officials and other members of the community as a means of opposing and inhibiting petitioners' activities. In view of the inflamed condition of the community at the time,[21] and with a frank recognition of the problems, the judge should have disqualified himself or granted a change of venue.

We have made previous reference to the constitutional right of a lawyer to represent his client. In *Sacher* v. *United States*, 343 U. S. 1 (1952), while sustaining a contempt conviction on the facts presented, this Court added, *id.* at 13-14.

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[21] In *Harris* v. *Virginia*, —— U. S. ——, 12 L. ed. 2d 1038 and *Allen* v. *Virginia*, 374 U. S. 93 (1963), this Court vacated and remanded unreported Virginia cases, the record of which indicates the conditions prevailing in Hopewell, Virginia.

> ". . . this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever. But it will not equate contempt with courage or insults with independence."

See also *In Re Green, supra; Cammer* v. *United States,* 350 U. S. 399 (1955).

These summary contempt convictions must therefore be viewed as punishing petitioners, not only for the events which took place in the courtroom, but also for being active civil rights lawyers. The convictions consequently operate as a judicially imposed impediment to the constitutionally guaranteed activities not only of petitioners but of the civil rights litigants they habitually represent.

Because of the belief that the injustices of racial inequality can be redressed within the framework of the law, lawyers who represent civil rights organizations are frequently in the center of each race relations crisis as it arises. Freedom of association, in the context of contemporary events, certainly includes the freedom of the association's counsel to represent the association and advocate its cause in court as much as it includes the association's right to be represented by counsel. *NAACP* v. *Button.* As Mr. Justice Douglas has said:

> "The citizen should know that in the courts one can get justice, no matter how discriminatory government officials may be . . . " The Bill of Rights is Not Enough, Fourth Annual James Madison Lecture, in Cahn, The Great Rights, p. 146.

CONCLUSION

For the reasons stated above, the convictions should be reversed.

Respectfully submitted,

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